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SUPREME COURT
STATE OF WASHINGTON
4/26/2019 10:46 AM
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STATE OF WASHINGTON
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NO. 95813-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN
APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

vs.

CITY OF SEATTLE,

Appellant.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS

PORTER FOSTER RORICK LLP

Jonathan Collins, WSBA No. 48807
601 Union St., Ste. 800
Seattle, WA 98101-4027
(206) 622-0203
jon@pfrwa.com

Counsel for Amicus Curiae
Washington State Association of Municipal Attorneys

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I. INTRODUCTION

In this case, the City of Seattle asks the Court to reverse the trial court’s conclusion that the “First-in-Time” rule (the “FIT” rule), which requires Seattle landlords to offer tenancy to the first applicant who satisfies the landlord’s screening criteria, constitutes an impermissible taking. But, more importantly, this case presents an opportunity for the Court to clarify Washington’s confusing and harmful Takings Clause analysis.

For decades, Washington courts have relied on a muddled Takings Clause analysis that wrongfully incorporates antiquated Due Process elements like the “undue oppression” standard. These elements, relics from the *Lochner*¹ era, allow courts to second-guess the efficacy of validly enacted regulations. But whether a regulation adequately serves its stated goal is not a proper inquiry under the Takings Clause, where the only question is whether property has been taken. And even under the Due Process clause, courts long ago abandoned the close scrutiny applied during the *Lochner* era, recognizing that the primary forum for evaluating regulation is the legislature, not the courts.

This is fundamentally why the persistence of Washington’s Takings Clause analysis is harmful—in addition to creating confusion among the

¹ *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

lower courts, it fails to grant the proper deference to local governments seeking to regulate property within their boundaries. Further, while this Court was at one time motivated by a concern for compensation as a remedy for takings, that concern is unwarranted. Neither the law nor practical policy concerns require the courts to protect local governments from the prospect of compensating property owners burdened by regulation.

This Court should clarify its approach to the Takings Clause by adopting the federal analysis, thereby eliminating confusion and restoring local governments' ability to regulate private property via the democratic process.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys who represent Washington's 281 cities and towns. WSAMA members represent municipalities throughout the state.

III. STATEMENT OF THE CASE

WSAMA adopts and incorporates by reference the Statement of the Case in the City's opening brief.²

² See City's Opening Brief at 6-13.

IV. ARGUMENT

A. The “undue oppression” standard derives from long-abandoned *Lochner* era Due Process jurisprudence.

During the *Lochner* era, the United States Supreme Court invalidated numerous government regulations on the grounds that they impermissibly infringed upon individuals’ economic rights. This doctrine stemmed from a belief that such rights are included among the fundamental rights protected by the Due Process clause.³ Accordingly, the Court permitted government interference with these rights only when it served one of a few limited public purposes: “safety, health, morals, and general welfare of the public.”⁴ The Court closely scrutinized government regulation to make sure such interference actually served a valid public purpose, stating that “many laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed for other motives.”⁵ This scrutiny included evaluating the efficacy of government regulations by determining

³ *Lochner*, 198 U.S. at 53.

⁴ *Id.*

⁵ *Id.* at 64.

whether “the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”⁶

But courts used this analysis to second-guess the wisdom of legislation, limiting the valid regulatory purposes legislatures could pursue and the means to pursue them. For this reason, the Court ultimately rejected the *Lochner* analysis and adopted the “rational basis” test, which acknowledges that governments “have the power to legislate against what are found to be injurious commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law.”⁷ Unlike the “undue oppression” analysis from the *Lochner* era, the rational basis test grants sufficient deference to the legislative process, recognizing that “it is for the legislature, not the courts” to determine the efficacy of economic regulations.⁸ Indeed, a “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”⁹

⁶ *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385 (1894); *see also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (discussing *Lawton*).

⁷ *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed. 93 (1963).

⁸ *Williamson v. Lee Optical*, 348 U.S. 483, 487, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

⁹ *West Coast Hotel v. Parrish*, 300 U.S. 379, 391, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

But the “undue oppression” standard persists despite nearly a century of jurisprudence rejecting *Lochner*-era reasoning.¹⁰ This standard first arrived in *Lawton*, which exemplifies the judicial activism that was a defining characteristic of the *Lochner* era. For example, the *Lawton* Court justified the undue oppression standard by stating that the “legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”¹¹

Thus, the undue oppression standard perpetuates a long-abandoned feature of the *Lochner* era. Specifically, it permits the courts to closely scrutinize and potentially upend economic regulation—despite lawful adoption via the democratic process—when, in the court’s judgment, the regulation interferes with the vague notion of economic liberty, a liberty that is not even mentioned in the constitution.¹² This grants the courts excessive power in determining the efficacy of economic regulations, when

¹⁰ See, e.g., *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31, 787 P.2d 907 (1990) (applying the “undue oppression” standard).

¹¹ *Lawton*, 152 U.S. at 137.

¹² See *West Coast Hotel v. Parrish*, 300 U.S. at 391 (“The Constitution does not speak of freedom of contract.”).

such determinations are better left to the legislature and the democratic process.

B. Washington’s difficulty with Takings analysis—including the continued use of the “undue oppression” standard—results from a period in which the United States Supreme Court conflated Takings analysis with Due Process.

Like its federal counterpart, this Court has similarly rejected the undue oppression standard as a relic of the *Lochner* era in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 226-28, 143 P.3d 571 (2006). But *Amunrud* was a Due Process case; this Court has yet to reconcile its Takings Clause analysis with the federal analysis.¹³ Indeed, Washington courts still cite “undue oppression” when considering the Takings Clause, sometimes noting the confusion surrounding which test applies.¹⁴

¹³ This Court has acknowledged that *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), clarified the analysis for regulatory takings. See *Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 435 n.9, 423 P.3d 223 (2018), as amended (Oct. 1, 2018). However, this Court has yet to clarify whether *Lingle* requires modifying Washington’s analysis, particularly with regard to the elements that derive from Due Process jurisprudence.

¹⁴ See City’s Opening Brief at 23 n.65; see also *Presbytery*, 114 Wn.2d at 328 (“The ‘tests’ for over-regulation have until recently proved somewhat of a quagmire of constitutional theory vacillating between substantive due process and ‘takings’ theory. Both this court and the United States Supreme Court have in the past struggled with the difficult determination of where a mere regulation ends and a ‘taking’ commences.”).

The United States Supreme Court created this confusion by conflating Due Process analysis with the Takings Clause.¹⁵ Indeed, “it may fairly be said that every major element in the Court’s modern Fifth Amendment regulatory takings jurisprudence . . . was founded in whole or in part on Fourteenth Amendment substantive due process precedents, and reflects substantive due process concepts and principles.”¹⁶

This muddled analysis spread to other jurisdictions.¹⁷ Thus, it is no surprise that Washington inherited the same problem. After all, “the vacuum in federal jurisprudence [on the Takings Clause] occurred at the very time when state courts, including Washington courts, were required by a series of cases to confront the issue.”¹⁸

¹⁵ See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 Minn. L. Rev. 826, 883–93 (2006) (tracing the historical roots of the confusion between due process and takings analysis); See also John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993) (labeling takings jurisprudence a “confused body of law”); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–63 (1984) (describing takings law as riddled with “confusion”).

¹⁶ Karkkainen, *supra* n.13 at 888.

¹⁷ See, e.g., *Phillips v. Montgomery County*, 442 S.W.3d 223, 239 (Tenn. 2014) (“[A] voluminous body of regulatory takings case law has developed and has been the subject of much debate . . . and frequent critique.”); see also *King v. City of Bainbridge*, 276 Ga. 484, 488, 577 S.E.2d 772 (2003).

¹⁸ Elaine L. Spencer, *Regulatory Taking and Inverse Condemnation*, in 7 Wash. State Bar Ass’n, Wash. Real Property Deskbook §110.4, at 110-14.

The United State Supreme Court eventually clarified the issue in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Court rejected the analysis in *Agins v. City of Tiburon*,¹⁹ which held that a municipal zoning ordinance constitutes a taking if it does not substantially advance a legitimate state interest. The Court emphasized that this formula improperly comingled Due Process and Takings Clause concepts:

The “substantially advances” formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause . . . But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.²⁰

After *Lingle*, the overwhelming majority of states adapted their Takings analysis to conform with the clarified federal standard.²¹ Washington, on the other hand, is one of a “small minority of states [that]have developed their own tests for regulatory takings.”²²

¹⁹ 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

²⁰ *Lingle*, 544 U.S. at 542.

²¹ See *Phillips*, 442 S.W.3d at 240-42 (citing state jurisdictions applying the federal standard post-*Lingle*).

²² *Id.* at 240 n.10 (citing *Manufactured Hous. Comtys. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000)).

What Washington lacks is its own “analogue to *Lingle*” that clarifies the elements of Washington Takings analysis and harmonizes it with the federal analysis.²³ Like the formula rejected in *Lingle*, the lingering Due Process concepts in Washington’s Takings analysis “require courts to scrutinize the efficacy of a vast array of . . . regulations—a task for which courts are not well suited.”²⁴ Adopting the federal takings analysis would not only clarify a confused area of law, but it would also reaffirm Washington cities’ authority to regulate private property interest via the democratic process.

C. Washington’s muddled approach to regulatory takings and substantive due process is not warranted by this Court’s stated desire to protect government from a compensation remedy.

Washington’s current approach to regulatory takings and substantive due process is based on a false dichotomy between police power and eminent domain.²⁵ Under this dichotomy, “a regulation must be evaluated as an exercise of *either* the police power under due process law *or* the power of eminent domain under takings law,” but may not be evaluated as both.²⁶

²³ See Roger D. Wynne, *The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125, 134 (2011).

²⁴ *Lingle*, 544 U.S. at 544.

²⁵ See Wynne, *supra* n.22 at 151-53.

²⁶ *Id.*

The police-power-or-eminent-domain dichotomy was first established in an 1887 U.S. Supreme Court decision, and it was later adopted by the Washington Supreme Court in 1921 and repeated in subsequent Washington decisions.²⁷ In 1922, however, the U.S. Supreme Court undercut this false dichotomy, articulating in *Pennsylvania Coal Co. v. Mahon* a contrary view that is now an axiom of federal takings law: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²⁸ In light of *Pennsylvania Coal* and other recent U.S. Supreme Court decisions, the dichotomy between police power and eminent domain no longer has any basis in the law.²⁹

In Washington State, however, courts continued to apply the false police-power-or-eminent-domain dichotomy well after *Pennsylvania Coal*. In *Orion Corp. v. State*, issued in 1987, this Court resolved the perceived tension surrounding *Pennsylvania Coal* by focusing on a misguided desire to protect government from the compensation remedy traditionally associated with takings claims:

²⁷ *Id.* (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)); *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921); *Orion Corp. v. State*, 109 Wn.2d 621, 646, 747 P.2d 1062 (1987); *Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 476, 647 P.2d 481 (1982); *Rains v. Wash. Dept. of Fisheries*, 89 Wn.2d 740, 745, 575 P.2d 1057 (1978); *Maple Leaf Investors, Inc. v. Dept. of Ecol.*, 88 Wn.2d 726, 732-33, 565 P.2d 1162 (1977); *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 408, 348 P.2d 664 (1960).

²⁸ Wynne, *supra* n.22 at 151-53 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)).

²⁹ *Id.* at 156-60 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Lingle*, 544 U.S. at 537).

[C]hoosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. If all excessive regulations require just compensation, rather than invalidation, land-use decisionmakers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems.³⁰

As explained below, however, there is no need to protect government from a compensation remedy, particularly in cases where, as here, the plaintiffs seek only declaratory or injunctive relief. Moreover, even if the compensation remedy posed a risk to government, any such risk is greatly outweighed by the confusion and uncertainty that government entities face under the current muddled approach.

1. There is no need to protect government from a compensation remedy.

There is no legal or practical need to protect government from a compensation remedy. As a legal matter, the U.S. Supreme Court has confirmed that a desire to shield government from the risk of compensation cannot trump the Fifth Amendment. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a California court had ruled that invalidation (rather than compensation) was the appropriate remedy for

³⁰ 109 Wn.2d at 649.

a taking, and the U.S. Supreme Court reversed, holding that the lower court's desire to protect local government did not warrant its ruling:

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.³¹

Thus, there can be no legal justification for relieving government from its obligation to pay compensation if there is a taking.

Nor is there any practical reason to shield government from the compensation remedy. Under the proper test for a taking, successful regulatory takings claims should be rare. As the City observes, other states have declined to follow Washington's use of "undue oppression,"³² and there is no indication that governments in those states have suffered under the federal takings analysis.

2. At a minimum, there should be no concern with compensation in cases seek only declaratory or injunctive relief.

For the reasons explained above, there is no merit to the historic judicial rationale that seeks to protect government from the compensation

³¹ 482 U.S. 304, 322, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

³² City's Opening Brief at 16, n. 56-57.

remedy. Even if that were not the case, however, that rationale would have no place in cases where, as here, the plaintiffs seek only declaratory or injunctive relief, not compensation. Such claims make sense where, as here, the claimed property interest is just a small stick from the larger bundle of property interests, and its value would likely be too small to establish and secure through litigation.

It also makes sense for courts to allow plaintiffs to seek only declaratory or injunctive relief in cases like this, even though compensation has been the relief historically associated with takings. It is true that the text of the federal and state Takings Clauses says the government may take property as long as it pays, suggesting that injunctive relief may be improper.³³ It is also true that a court cannot force a plaintiff to accept only invalidation of a challenged ordinance if the plaintiff seeks compensation for the period during which the ordinance was in effect.³⁴ But this Court has entertained takings claims where the plaintiff sought only to invalidate a regulation because it effects a taking, presumably on the premise the government would rationally agree to choose invalidation over compensation. For example, in *Guimont v. Clarke*, a group of mobile home

³³ See *Orion*, 109 Wn.2d at 649; *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987) (“As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.”).

³⁴ See *First English*, 482 U.S. at 314; *Wynne* at 161-63. *Wynne* refers to compensation as the “proper constitutional remedy” for takings, but that reference was premised on the assumption that a plaintiff wants compensation. See *Wynne* at 147 n.117. But in cases where a plaintiff seeks no compensation, courts are not compelled to insist on that traditional remedy.

park owners sued Thurston County's Department of Community Development seeking a declaratory judgment that the Mobile Home Relocation Assistance Act was unconstitutional.³⁵ They did not seek monetary damages. Likewise, in *Allingham v. City of Seattle*, a group of landowners sought to invalidate a Seattle zoning ordinance that required certain properties be retained in or restored to a natural state, but did not seek compensation. This Court affirmed the trial court's holding that certain sections of the ordinance "constituted a taking of property without just compensation and that therefore the ordinance was invalid as a zoning regulation."³⁶ In such cases, there is no reason to worry about a compensation remedy.

3. Any risk associated with a compensation remedy is outweighed by the confusion and uncertainty sowed by the current situation.

Washington's current approach to takings and due process, where courts claim to follow the federal analysis but actually use a radically different analysis, is unworkable. Local governments routinely struggle with Washington's muddled approach. For example, the Growth

³⁵ 121 Wn.2d 586, 593, 854 P.2d 1 (1993) (finding the Act was not a taking, but violated owners' substantive due process rights).

³⁶ *Allingham v. City of Seattle*, 109 Wash. 2d 947, 948, 749 P.2d 160, 161, amended, 757 P.2d 533 (Wash. 1988), and overruled on other grounds by *Presbytery of Seattle v. King Cty.*, 114 Wash. 2d 320, 787 P.2d 907 (1990). The Court later modified its opinion to add the following text in a footnote: "The remedy we grant of invalidation of the ordinance is a remedy consistent with the denial of substantive due process . . . Overly severe landowner regulations have previously resulted in our labeling those actions as 'takings.'" 757 P.2d at 534 (Order Changing Opinion).

Management Act requires local governments to conduct a takings analysis for most local land use ordinances, and further requires to Attorney General to provide guidance to help local governments avoid unconstitutional takings in their land use decisions.³⁷ In addressing the issue of substantive due process, however, the guidance provided by the Attorney General's Office is largely unhelpful, reciting the three-part test for "undue oppression" but noting in a footnote that the test has been called into question:

In *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), which is not a land use case, the Court specifically declined to apply the "unduly oppressive" prong from *Presbytery*, holding that it had no place in rational basis review. *Amunrud* has been followed in at least one reported land use decision.³⁸

If this Court embraces the relatively straight-forward federal analysis, the Attorney General will be able to provide clear guidance to local planners

³⁷ See RCW 36.70A.370 (requiring the Attorney General to "establish . . . an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property" and requiring local governments planning under the Growth Management Act to use the process established by the Attorney General "to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property").

³⁸ State of Washington Office of the Attorney General, "Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property" at 11, n. 2, https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Takings/2018%20AGO%20Takings%20Guidance%20Update%2008-31-2018.pdf (September 2018).

and decision makers, and local governments will be better able to identify and avoid proposed regulations that would effect a taking.

V. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court and enter a judgment for the City.

RESPECTFULLY SUBMITTED this 26th day of April, 2019.

PORTER FOSTER RORICK

By: /s/ Jonathan Collins
Jonathan Collins,
WSBA No. 48807
601 Union St., Ste. 800
Seattle, WA 98101-4027
(206) 622-0203
jon@pfrwa.com

Attorneys for Amicus Curiae
Washington State Association of Municipal Attorneys

CERTIFICATE OF SERVICE

The undersigned declares that on or before the date below, I electronically filed the foregoing document via the Washington Courts Appellate e-Filing system, which will send notification to each and every attorney of record herein, as identified below:

Mr. Roger Wynne; Ms. Sara O'Connor-Kriss
Roger.Wynne@seattle.gov; Sara.OConnor-Kriss@seattle.gov

Mr. Ethan Blevins; Mr. Brian Hodges
EBlevins@pacificlegal.org; BHodges@pacificlegal.org

DATED on April 26, 2019.

By: /s/ Jonathan Collins
Jonathan B. Collins, WSBA No. 48807
601 Union St., Ste. 800
Seattle, WA 98101-4027
(206) 622-0203
jon@pfrwa.com

PORTER FOSTER RORICK

April 26, 2019 - 10:46 AM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Chong and Marilyn Yim, et al. v. The City of Seattle
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